

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
EUREKA DIVISION

ROBERT LEE BORDEN,
Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,
Defendant.

Case No. 14-cv-04332-NJV

**ORDER RE MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 21, 32

Plaintiff Robert Lee Borden seeks judicial review of an administrative law judge (“ALJ”) decision denying his application for disability insurance benefits under Title II of the Social Security Act and Supplemental Security Income payments under Title XVI of the Act. AR 161. Plaintiff’s request for review of the ALJ’s unfavorable decision was denied by the Appeals Council. AR 1-6. The decision thus is the “final decision” of the Commissioner of Social Security, which this court may review. *See* 42 U.S.C. §§ 405(g), 1383(c)(3). Both parties have consented to the jurisdiction of a magistrate judge. (Docs. 6,7.) The court therefore may decide the parties’ motions for summary judgment. For the reasons stated below, the court will deny Plaintiff’s motion for summary judgment, and will grant Defendant’s motion for summary judgment.

LEGAL STANDARDS

The Commissioner’s findings “as to any fact, if supported by substantial evidence, shall be conclusive.” 42 U.S.C. § 405(g). A district court has a limited scope of review and can only set aside a denial of benefits if it is not supported by substantial evidence or if it is based on legal

error. *Flaten v. Sec’y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995). Substantial evidence is “more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Sandgathe v. Chater*, 108 F.3d 978, 979 (9th Cir. 1997). “In determining whether the Commissioner’s findings are supported by substantial evidence,” a district court must review the administrative record as a whole, considering “both the evidence that supports and the evidence that detracts from the Commissioner’s conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998). The Commissioner’s conclusion is upheld where evidence is susceptible to more than one rational interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

THE FIVE STEP SEQUENTIAL ANALYSIS FOR DETERMINING DISABILITY

A person filing a claim for social security disability benefits (“the claimant”) must show that he has the “inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment” which has lasted or is expected to last for twelve or more months. 20 C.F.R. §§ 416.920(a)(4)(ii), 416.909. The ALJ must consider all evidence in the claimant’s case record to determine disability, *id.* § 416.920(a)(3), and must use a five-step sequential evaluation to determine whether the claimant is disabled. *Id.* § 416.920. “[T]he ALJ has a special duty to fully and fairly develop the record and to assure that the claimant’s interests are considered.” *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983). Here, the ALJ evaluated Plaintiff’s application for benefits under the required five-step sequential evaluation. AR 19-30.

At Step One, the claimant bears the burden of showing he has not been engaged in “substantial gainful activity” since the alleged date the claimant became disabled. 20 C.F.R. § 416.920(b). If the claimant has worked and the work is found to be substantial gainful activity, the claimant will be found not disabled. *Id.* The ALJ found that Plaintiff had not engaged in substantial gainful activity since February 14, 2011, his alleged onset date. AR 24.

At Step Two, the claimant bears the burden of showing that he has a medically severe impairment or combination of impairments. 20 C.F.R. § 416.920(a)(4)(ii), (c). “An impairment is not severe if it is merely ‘a slight abnormality (or combination of slight abnormalities) that has no more than a minimal effect on the ability to do basic work activities.’” *Webb v. Barnhart*, 433

1 F.3d 683, 686 (9th Cir. 2005) (quoting S.S.R. No. 96–3(p) (1996)). The ALJ found that Plaintiff
2 suffered the following severe impairments: arthritis, high blood pressure, hearing loss, pain, back
3 pain, and obesity. AR 24.

4 At Step Three, the ALJ compares the claimant’s impairments to the impairments listed in
5 appendix 1 to subpart P of part 404. *See* 20 C.F.R. § 416.920(a)(4)(iii), (d). The claimant bears
6 the burden of showing his impairments meet or equal an impairment in the listing. *Id.* If the
7 claimant is successful, a disability is presumed and benefits are awarded. *Id.* If the claimant is
8 unsuccessful, the ALJ assesses the claimant’s residual functional capacity (“RFC”) and proceeds
9 to Step Four. *Id.* at § 416.920(a)(4)(iv),(e). Here, the ALJ found that Plaintiff did not have an
10 impairment or combination of impairments that met or medically equaled one of the listed
11 impairments. AR 25. Next, the ALJ determined that Plaintiff retained the RFC “to perform
12 medium work” with several physical and environmental limitations. AR 26. The ALJ found that
13 Plaintiff "can perform frequent reaching, fingering and feeling with the upper left extremity; can
14 perform frequent handling with the upper left extremity; is unable to use a telephone to
15 communicate; and is limited to a quiet and moderate noise environments." *Id.*

16 At Step Four, the ALJ determined that Plaintiff was incapable of performing his past
17 relevant work. AR 28.

18 At Step Five, the ALJ found that considering Plaintiff’s age, education, work experience
19 and RFC, jobs existed in significant numbers in the national economy that Plaintiff could perform.
20 AR 29. Accordingly, the ALJ found Plaintiff was not disabled. AR 30.

21 **DISCUSSION**

22 **Left Arm Numbness and Pain**

23 Plaintiff contends that the ALJ committed error in failing to adequately consider his
24 medically determined impairment of left arm numbness and pain as a severe impairment. Plaintiff
25 argues that the error was not harmless because without a list of a claimant’s impairments, it is not
26 possible to accurately analyze the conditions to be addressed in Steps Three, Four and Five. He
27 claims that designation of his left arm impairment as a severe impairment would have reduced his
28 RFC to no more than light level exertion, which would have resulted in finding that he was

1 eligible for disability under Medical-Vocational Guideline 202.06.20 due to his age.

2 The ALJ's findings regarding Plaintiff's severe impairments and RFC were supported by
3 substantial evidence in the record. As the ALJ noted, consultative examiner Brian Dossey, M.D.,
4 examined Plaintiff on June 14, 2011. AR 28, 262-265. Dr. Dossey noted Plaintiff's complaints of
5 lower back pain, hearing loss, left arm numbness, and pain in both knees, which was worse in the
6 right knee. AR 262. He observed that Plaintiff was able to move without much difficulty, sat
7 comfortably during the examination, got on and off the examination table without difficulty, and
8 walked, hopped, and squatted normally. AR 263. Dr. Dossey noted that Plaintiff had some
9 muscle atrophy in the left shoulder and rib cage area, as well as hypersensitivity of the
10 paravertebral muscles on the left side of the spine and mild tenderness. AR 264. He also noted
11 that Plaintiff, who is right-handed, had normal motor strength including grip strength in both the
12 left and right upper and lower extremities. AR 264. Based on his examination, and "based upon
13 [Plaintiff's] atrophy of his left shoulder area, related to the scapula and thoracic cage," Dr. Dossey
14 concluded that Plaintiff could perform medium work, with no postural or manipulative limitations.
15 AR 265.

16 The ALJ accorded Dr. Dossey's findings partial weight, because Dr. Dossey had the
17 opportunity to conduct a comprehensive examination of Plaintiff and the findings were consistent
18 with the residual functional capacity limitation to medium work. AR 28. However, the ALJ
19 further credited Plaintiff with additional limitations due to Plaintiff's allegations of left arm pain
20 and numbness, hearing loss, and tinnitus. *Id.* Because Dr. Dossey's findings were based upon his
21 own independent clinical findings, the ALJ was entitled to rely on Dr. Dossey's assessment. *See*
22 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (consultative physician's opinion
23 based on examination constitutes substantial evidence).

24 The ALJ also reviewed and considered Plaintiff's treatment records from the Veterans
25 Administration ("VA"). AR 27. The ALJ observed that the records were generally unremarkable
26 and showed treatment in 2011 and 2012 for high blood pressure, obesity, back pain, knee pain,
27 arthritis, and hearing loss. AR 27. Plaintiff first went to the Eureka VA Clinic on April 8, 2011,
28 to establish care and was taking no medications at the time. AR 247. He complained of numbness
in his left hand and that he did not have as much strength in the left arm as in the right, but stated

1 that he could use the arm for activities and grip objects. *Id.* Plaintiff also complained of hearing
2 loss. AR. 247. The nurse diagnosed Plaintiff with hypertension, left side injury, hearing loss, and
3 tobacco use disorder. AR 248. As the ALJ noted, Plaintiff's records indicate that Plaintiff
4 received "routine and conservative medical care for complaints of back pain, knee pain, left upper
5 extremity pain, and tinnitus." AR 27. She specifically found that "[t]he record shows no
6 tenderness of the knees and upper left extremity, with full extension and flexion of the knees, the
7 ability to walk without problem throughout the day, and full range of motion of the left shoulder."
8 *Id.*

9 Plaintiff asserts that the ALJ erred in stating that Plaintiff did not have tenderness of his
10 left upper extremity. AR 27. However, this appears to be an inadvertent misstatement. The ALJ
11 noted and credited Plaintiff's complaints of tenderness and Dr. Dossey's opinion, which included
12 a finding of mild tenderness, in her decision. AR 28, 264. The ALJ specifically discussed and
13 considered the treatment records regarding Plaintiff's alleged left arm numbness and pain. AR 27-
14 28. As the ALJ noted, treatment notes from October 2011 reported that Plaintiff had full range of
15 motion of his left shoulder and that he was able to use his left upper extremity for all activities.
16 AR 27, 335. The ALJ further noted that Plaintiff reported that was able to hunt, fish, and maintain
17 land around his house and did not require any pain medication or assistive device. AR 27, 335.
18 Significantly, Plaintiff's treating doctor indicated that Plaintiff's left shoulder muscle strength was
19 normal and its condition did not impact his ability to work. AR 28, 352, 357.

20 The ALJ reviewed Plaintiff's testimony, and found that his medically determinable
21 impairments, which would include Plaintiff's left arm and hand problems as well as the
22 osteoarthritis of his knees, could reasonably be expected to cause the symptoms Plaintiff
23 described. AR 26. The ALJ, however, found that Plaintiff's statements about the intensity,
24 persistence and limiting effects of these symptoms were not entirely credible. *Id.* The ALJ noted
25 that Plaintiff had described daily activities which were not as limited as would be expected given
26 his descriptions of disabling symptoms and limitations. AR 26-27.

27 The court finds that Plaintiff has not demonstrated error in the ALJ's consideration of
28 Plaintiff's left arm numbness and pain and her determination of Plaintiff's severe impairments and
RFC. The ALJ reasonably concluded that the residual functional capacity was supported by the

1 medical evidence of record, including the overall assessment of the VA doctors. AR 28. As
 2 Defendant argues, Plaintiff essentially simply offers alternative interpretations of the evidence in
 3 the record. It is the ALJ's province to resolve any evidentiary conflicts. *See Tommasetti v.*
 4 *Astrue*, 535 F.3d 1035, 1041-42 (9th Cir. 2008) (“[T]he ALJ is the final arbiter with respect to
 5 resolving ambiguities in the medical evidence.”). In this case, the ALJ's decision is supported by
 6 substantial evidence and therefore must be upheld.

7 Plaintiff further contends that the ALJ erred by not considering his left hand condition in
 8 combination with his other impairments as required in Step 2, regardless of whether the left hand
 9 condition was found to be a severe impairment. The court finds no merit to Plaintiff's contention.
 10 The ALJ expressly stated that she "reviewed all of the evidence" in concluding that Plaintiff did
 11 not have an impairment or combination of impairments that met or medically equaled one of the
 12 listed impairments. AR 25. The ALJ's review of the evidence is set forth at length at pages 26 -
 13 28 of her decision, in connection with her residual capacity determination. As the court explained
 14 in *Miles v. Astrue*, No. 5:11-CV-04013-LHK, 2013 WL 5372337, at *13 (N.D. Cal. Sept. 24,
 15 2013),

16 The fact that the ALJ's discussion of Devine's report appeared in step two rather than step
 17 four also is not error. In *Lewis v. Apfel*, the Ninth Circuit held that the ALJ had not erred in
 18 providing a boilerplate statement that the claimant had not met a listed impairment at step
 19 three where the ALJ also provided in another section a discussion of the claimant's
 20 conditions and treatment history. 236 F.3d 503, 513 (9th Cir.2001). The Ninth Circuit
 21 observed that the ALJ is required “to discuss and evaluate the evidence that supports his or
 22 her conclusion” but not necessarily under a particular heading. *Id.* As other courts have
 pointed out “Lewis does not require that the support for the ALJ's conclusions be placed in
 a specific section of the decision.” *Harris v. Astrue*, No. CV 08–0831 JSW, 2009 WL
 801347 at *7 (N.D. Cal. Mar. 25, 2009); see also *Perez v. Astrue*, 831 F.Supp.2d 1168,
 1175–76 (C.D. Cal.2011) (finding ALJ's discussion at step two sufficient to support ALJ's
 RFC finding).

23 The court finds no error by the ALJ in regard to considering Plaintiff's left hand condition in
 24 combination with his other impairments as required in Step 2.

25 **Osteoarthritis in Knees**

26 Plaintiff contends that the ALJ erred by not appropriately considering the medically
 27 determined impairment of osteoarthritis in both knees, incorporating the arguments made in regard
 28 to Plaintiff's impairment of left arm numbness and pain. The court rejects those arguments for the

1 same reasons as stated above. The ALJ specifically discussed and considered Plaintiff's
2 allegations of knee pain. AR 27-28. The ALJ noted that an August 2011 x-ray of Plaintiff's knee
3 showed mild to moderate medial compartment joint space narrowing on the weight bearing views
4 bilaterally and spurs of the tibial spines but otherwise appeared normal. AR 27, 282. The ALJ
5 noted that Plaintiff was diagnosed with osteoarthritis. AR 27, 282. The ALJ also noted that
6 Plaintiff reported to his doctor that he had pain and stiffness in both knees when getting up in the
7 morning and then felt better as day progressed, with pain in the lateral inner aspect of both knees
8 but no problems with walking during the day. AR 27, 297. The ALJ also observed that Plaintiff
9 had not taken any pain medication for his symptoms, had not undergone injections for his pain,
10 and was not prescribed a splint, braces, or cane, which indicated his ability to walk without
11 assistance. AR. 27.

12 The court finds that Plaintiff has not demonstrated error in the ALJ's consideration of
13 Plaintiff's osteoarthritis in both knees. The ALJ reasonably concluded that the residual functional
14 capacity was supported by the medical evidence of record, including the overall assessment of the
15 VA doctors. AR 28. Again, Plaintiff simply offers alternative interpretations of the evidence in
16 the record. The Commissioner's conclusion is upheld where evidence is susceptible to more than
17 one rational interpretation. *Burch*, 400 F.3d at 679.

18 **Reliance on Opinion of Vocational Expert**

19 Plaintiff contends that the ALJ erred in relying on the representative occupation of
20 chauffeur provided by the vocational expert. Plaintiff argues that because he testified that he
21 cannot grip with his left hand, and the vocational expert testified in response to questioning by
22 Plaintiff's counsel that Plaintiff would not be able to perform the job safely if he could not grip the
23 steering wheel with both hands, the ALJ failed to consider important testimony and erred in
24 finding that Plaintiff could perform work related to his former job of truck driver.

25 As explained above, the ALJ did consider Plaintiff's testimony regarding his impairments,
26 but found that his testimony regarding the persistence, intensity and limiting effects of those
27 impairments was not entirely credible. "The hypothetical that the ALJ posed to the VE contained
28 all of the limitations that the ALJ found credible and supported by substantial evidence in the

1 record. The ALJ's reliance on testimony the VE gave in response to the hypothetical therefore was
2 proper." *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005). The court finds no error.

3 **Function-by-Function Assessment**

4 Plaintiff contends that the ALJ erred in failing to conduct a function-by-function
5 assessment as required by SSR 96 in order to determine his RFC. Plaintiff proposes that this
6 Court follow the approach discussed in the Fourth Circuit case, *Mascio v. Colvin*, 780 F.3d 632,
7 636 (4th Cir. 2015). In *Mascio*, the Fourth Circuit remanded a case for further proceedings,
8 finding that the ALJ's failure to perform the function-by-function analysis required remand. *Id.* at
9 635-637.

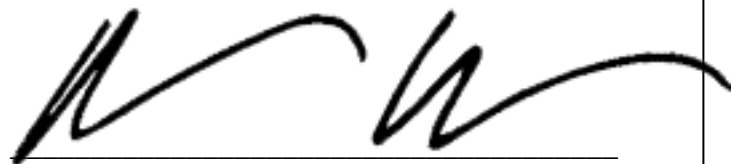
10 The Ninth Circuit has determined that "[p]reparing a function-by-function analysis for
11 medical conditions or impairments that the ALJ found neither credible nor supported by the record
12 is unnecessary." *See Bayliss*, 427 F.3d at 1217 (citing SSR 96-8p). SSR 96-8p states an ALJ
13 should assess a claimant's work-related abilities on a function-by-function basis, including the
14 functions in paragraphs (b), (c), and (d) of 20 CFR Section 404.1545. Here, the ALJ expressly
15 discussed and analyzed these functions – Plaintiff's physical abilities, mental abilities, and
16 other abilities, such as Plaintiff's hearing impairment. AR 24-28. *See* 20 C.F.R. § 404.1545(b)-
17 (d). The court finds no error.

18 **CONCLUSION**

19 Based on the foregoing, Plaintiff's Motion for Summary Judgment is DENIED and
20 Defendant's Motion for Summary Judgment is GRANTED. The court will issue a separate
21 judgment.

22 **IT IS SO ORDERED.**

23 Dated: March 15, 2016



24
25 NANDOR J. VADAS
26 United States Magistrate Judge
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